

ALTERNATIVE DISPUTE RESOLUTION

Law & Practice

Alternative Dispute Resolution: Law and Practice is divided into 44 chapters which cover alternative dispute resolution (ADR) mechanisms in all their varieties, including negotiation, mediation, conciliation, ombudsman, arbitration, and court adjudication. These ADR mechanisms can be used alongside existing court systems and have gained widespread acceptance because of its speedy resolution of disputes and outcomes that preserve and sometimes even improve relationships.

The primary objective of this book is to enhance reader's understanding of the various regulatory framework governing ADR on diverse issues at both national and international levels. This includes the application of ADR to fintech, Islamic banking and finance, labour, and construction disputes among others. Online dispute resolution, Singapore Mediation Convention, and university arbitration are also featured in this book.

All those concerned, both the legal and non-legal community such as legal practitioners, arbitrators, mediators, academicians, and students, will find this book as a valuable aid for a good understanding of matters pertaining to ADR without having to refer to several other sources.



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Edited by
Adnan Yaakob
Ashgar Ali Ali Mohamed
Arun Kasi
Mohammad Naqib Ishan Jan
Muhamad Hassan Ahmad



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IV. Mohammad Naqib Ishan Jan.

V. Muhamad Hassan Ahmad.

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CHAPTER 41

OMBUDSMAN*

Introduction

The ombudsman concept has grown from being a medieval administrative mechanism into a modern tool for market regulation, dispute resolution, complaint handling, consumer protection and access to justice. The mid-19th century witnessed the widespread use of the ombudsman for citizen protection against public maladministration. Consequently, it gained wide acceptance all over the world and metamorphosed into institutions for industry regulation and consumer redress in the private and public sectors.¹

This chapter examines the meaning and conceptual understanding of the ombudsman with emphasis on its origin and cultural underpinnings in selected legal traditions. It also discusses significant roles of the ombudsman in public and private sector businesses. Although the classical ombudsman has a generalist role and jurisdiction in all matters and complaints related to public maladministration, special ombudsman schemes emerged with the exigencies of private sector

* This chapter is contributed by Sodiq O. Omoola.

1 F Fowlie 'A Practitioner's Guide to Evaluating Ombudsman Offices' International Ombudsman Institute, Wier Library, Faculty of Law, University of Alberta 2007; R James *Private Ombudsmen and Public Law* (1997); DC Rowat 'The New Private-Sector Ombudsmen' Policy Options (November 2003) pp. 46-48.

regulation with potential for e-commerce business regulation. Therefore, the ombudsman has been used in regulating public services such as health, long-term care, employment, army, police, etc.²

In addition, the study of modern trends in ombudsman classifications seeks to align the ombudsman concept with trends in the 21st century consumer protection practices. As part of the growing field of Alternative Dispute Resolution (ADR), the ombudsman has been preferred for its accessibility, often free to the public and non-cumbersome processes and procedures. Similarly, the choice of ombudsman as an ADR method can be attributed to some of its unique characteristics such as neutrality, independence, confidentiality and accountability.³

In addition, this chapter discusses the essential characteristics of the ombuds office as a complaint mechanism in the public and private sector; and analyses models of regulation for the ombudsman which may be applicable in any business environment including e-commerce.

Origin And Evolution Of Ombudsman

In order to understand the flexibility of applying the ombudsman to different sectors, consumer protection and dispute resolution endeavours, it is necessary to appraise the evolution of the ombudsman.

Historically, ancient cultures and societies like the Romans, Egyptians, Chinese Han Dynasty, Indians and the Ottoman Turks, had some sort of citizen complaint mechanism in public administration.⁴ This

² LC Reif *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (1999) p. 52.

³ SA Wiegand 'A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model' *Ohio St. J. on Disp. Resol* Vol. 12 (1996) p. 95.

⁴ GE Caiden, N MacDermot, A Sandler 'The Institution of Ombudsman' in *International Handbook of the Ombudsman: Evolution and Present Function* Vol. 1 (1983).

section examines and considers the dynamics and usage in public and private sectors. Particular emphasis is placed on the influence in business regulation and consumer protection which can be a lesson for e-commerce business in the 21st century.

Ombudsman In Chinese Legal Tradition

The Chinese civilisation and its public control system are also important in the array of ancient ombuds practice around the world. This is because the Chinese legal tradition possesses semblances of the ombudsman which have been observed to be older than the Danish Parliamentary Ombudsman Act of 1954.⁵ Tao also elucidates on the Chinese control system known as the Control Yuan which dates back to 221BC and reaffirmed in the 1947 Chinese Constitution. This predates the American and British ombudsman which emerged in the 1960s.

The Control Yuan with over one hundred and eighty members was seen as formidable and significant among the people. It was considered as a branch of parliament with representation in the municipal and provincial councils as far as the former Chinese provinces in Vietnam, Mongolia and Tibet.⁶ The office of the Imperial Censor-General, also known as, *Yu-shih ta-fu*, was the head of Control Yuan which was established as a measure taken by the Emperor Shi Huang of the Qin Dynasty (221 to 206 BC) to protect his kingdom. Just as the Great Wall served as a defence line, the Censorate was meant to prevent public officials from neglecting their duties.⁷ The Censorate exercised powers

⁵ P-C Tao 'The Chinese Ombudsman and Control System' *St John's Law Review* Vol. 41 1967 p. 362.

⁶ *Ibid*; See also RL Walker 'The control system of the Chinese government' *The Journal of Asian Studies* Vol. 7(01) November 1947 pp. 3-21.

⁷ CO Hucker 'The Traditional Chinese Censorate and the New Peking Regime' *American Political Science Review* Vol. 45(04) December 1951 pp. 1041-1057.

over consent on impeachment, auditing, correction, among others. The office of the Censorate had high recognition and was assigned with the privileges of the Prime Minister with the possibility of exercising the impeachment process on the Prime Minister or any other office.

During the Ching Dynasty of 1637, the Emperor turned the Censorate to a court charged with monitoring breaches by public officials including the Emperor, princes and his appointees. The duty of the Censorate court was captured in the words of the Emperor as follows:

The Censors are to criticise straightforwardly my extravagance, mistreatment of the loyal and the able, being indulged in hunting, negligence of duty, demotion of meritorious, appointment of the unfit, or promotion of the unserviceable. If the princes neglect their work, take property from the people without due compensation, or indulge in wine, women, or any sensual pleasure, the Censorate shall investigate and impeach them. If the six departments or their ministries decide things wrongly, or delay review or trial of criminal cases, the Censors shall make them known to me. The Censorate shall check its own members from receiving bribery. A Censor, who takes revenge on someone by impeachment, thus abusing his power, shall be prosecuted. But he will not be blamed, even if what he says is not right. And what he says is right will be adopted.⁸

It is important to note that the Emperor proscribed revenge by impeachment. Thus, conflict of interest was not allowed on the part of the officials of the court. Prevention of official neglect of duties was considered as one of the focal points in the terms of the Censorate court.

Professor Walker attempted to investigate why Western scholars have not learnt from the East or at least acknowledge the role of the Control Yuan in public administration. He further opined that this was due to

⁸ Cited in P-C Tao 'The Chinese Ombudsman and Control System' *St John's Law Review* Vol. 41 1967 p. 362.

language difficulty and the inept refusal of Western scholars in paying attention to the political practices in Chinese communities.⁹ Thus, this ombudsman-like institution of the Chinese was largely unknown to other parts of the world.

The Greek/Roman *Agoranomos*

The second ancient origin attributable to the modern ombudsman is the *agoranomos* of the Greek/Roman civilisation which emerged between 200 and 300 AD. In the ancient Greek tradition, the word *agoranomos* which literally means 'market inspector', was an official who had the duty of inspecting the market.¹⁰ Due to its importance, the office remained in the minds of the people even after the Roman conquest of the Greeks with some inscription on public places.¹¹ The system also spread to parts of Asia Minor, Egypt and Palestine during the Roman reign.¹² However, the function expanded beyond the market to maintenance of public places. According to Benjamin Foster, who cited the works of Plato, the great philosopher, the duties and function of the *agoranomos* was mainly to enforce the decision of the ruler with the help of retailers. He stated succinctly as follows:

The *agoranomos* would find out from experienced retailers all the adulterations and trickery practices by unscrupulous merchants and would post them too as a sort of buyers' guide. He was to watch over the temple in the agora lest any offense be perpetrated therein. He should

⁹ RL Walker 'The control system of the Chinese government' *The Journal of Asian Studies* Vol. 7(01) November 1947 p. 4.

¹⁰ See BR Foster 'Agoranomos and Muhtasib' *Journal of the Economic and Social History of the Orient/Journal de l'histoire Economique et Sociale de l'Orient* 1970 pp. 128-144; MG Raschke 'The office of *agoranomos* in Ptolemaic and Roman Egypt' *Akten Des XI Internationalen Papyrologenkongresses* 1974 pp. 349-356; D Sperber 'On the Office of the *Agoranomos* in Roman Palestine' *Zeitschrift Der Deutschen Morgenländischen Gesellschaft* 127(2) 1977 pp. 227-243.

¹¹ D Magie *Roman Rule in Asia Minor* (Vol. 6) (1950) p. 1511.

¹² *Ibid.*

wander through the markets with a whip in his hand to administer summary punishment to offenders if they were not citizens. If they were citizens they were to be mulcted according to the law. If the charge was denied the *agoranomos* would administer an oath, for it was considered unlikely that a man would risk the wrath of the gods to save a fine. His colleague the *astynomos* was responsible for the maintenance of the streets and public buildings outside the agora; the *agoranomos* was responsible for the inside.¹³

The role of the *agoranomos* and the *muhtasib* in the Islamic traditions are both proactive in their duties. Although the name *agoranomos* lost its significance in the third century BC, it was referred to as *aedile*. Benjamin Foster argued that the name or title of a man who performed the function of an ombudsman in the Roman and Byzantine Empire was not as important as the function and powers of the official.¹⁴ Thus an aspect of the Digests of Justinian urban law shows the office of someone who oversees road maintenance, water, grain supply, policing etc.

In distinction with the *muhtasib*, the *agoranomos* or *aedile* performed some public benefactor role to include, repair of public baths and temples; supply of furniture to market restaurants or halls; provide oil for the public gymnasia for non-financial reward such as memorial, public wreath or honour initiation into high societal status.¹⁵ It is however uncertain whether there is any basis for comparison between *muhtasib* and *agoranomos* on the basis of date and occurrence in the context of ombudsman research.

13 BR Foster 'Agoranomos and Muhtasib' *Journal of the Economic and Social History of the Orient*/*Journal de l'histoire Economique et Sociale de l'Orient* 1970 p. 129.

14 *Ibid.*

15 A Boeckh *Corpus inscriptionum graecarum* (Vol. 1) (1843) p. 1125.

Ombudsman In Islamic Legal Tradition

The development of *hisbah* and its use as a market regulatory tool in the early Islamic era serves the basis of ombudsmen in western civilisations.¹⁶ The influence of Islamic legal tradition in the development of the ombudsman concept in western societies is rarely acknowledged. It is literally known as *muhtasib* and derived from the word *hisbah* or accountability. Similarly, the Turkish institution of *Qazi'ul'Quzat* emanates from a practice recorded in Muslim tradition. Prophet Muhammad (s.a.w.) was reported to sit regularly in the mosque to hear grievances from the public. This example was passed down to the Caliphs and the subsequent generations including the Ottoman rulers.¹⁷

The practice of *muhtasib* has been highly synonymous with market regulations although there is evidence of its use in other forms of specialised trade and its diffusion in other mundane aspects of daily living. Based on the principles of 'enjoining what is right, forbidding what is wrong' established in *Qur'an Aal Imran* 3:110, the general duty of encouraging the good and forbidding the evil has been the justification for *muhtasib* in several human endeavours. The *muhtasib* was also appointed to ensure proper regulation of day-to-day activities beyond the market setting into other commercial and non-commercial endeavours. It is known in ancient records and classical writings that people who hold the office of *muhtasib* were active in the development and regulation of pharmacy, shipping, animal husbandry, leather works, medicine, teaching, public facilities and others.¹⁸

16 P Vernia 'The Muhtasib of Valencia and Pharmacy in Aragon' *Pharmacy in History* 30(2) 1988 pp. 89-93.

17 BR Foster 'Agoranomos and Muhtasib' *Journal of the Economic and Social History of the Orient/Journal de l'histoire Economique et Sociale de l'Orient* 1970 p. 129; Z Rahmani 'Wafaqi Mohtasib (Federal Ombudsman) Institution: An Effort of Harmonisation with Shariah' *Annual Report of the Wafaqi Mohtasib* 1985 pp. 5-6; P Vernia 'The Muhtasib of Valencia and Pharmacy in Aragon' *Pharmacy in History* 30(2) 1988 pp. 89-93.

18 ASM Shahabuddin *Regulation of Economic Life in Hisbah Literature — 9th to 14th Century CE* (2009) pp. 278-339.

In the early Islamic era, the quest for the public and administrative institution for grievance appraisal and redress was necessitated by the annual influx of pilgrims from around the world. The spread of Islam in Persia (Iran), Andalusia (Spain) and other parts of Europe including Turkey further made the *muhtasib* an essential part of public life in Muslim societies.¹⁹

Within the context of market regulation in the Islamic era, it was on record that *muhtasib* was essential to regulating commerce in market places around Arabia. The need to regulate the *suq* or markets in Makkah and Medina were considered as necessary and non-ritual part of the pilgrimage. This also enhanced the commercial role of the *muhtasib* officers. RP Buckley²⁰ asserts that there was no record of an official *muhtasib* during the *jahiliyah* (pre-Islamic) period. Therefore, it seems to be a product of Islam and the spectacular leadership qualities of Prophet Muhammad (s.a.w.). Ibn Hazm recorded that *Hakim bin Umayya* was a *hakam* (arbitrator) who was known for 'ordering good and forbidding evil' during the *jahiliyah* period.²¹ Where an arbitrator was not able to resolve the dispute or proved ineffectual, further appeal was made to the *kahin* (soothsayer) who was believed to possess divine inspiration and most likely, provided positive and acceptable results for the disputants.²²

19 BR Foster 'Agoranomos and Muhtasib' *Journal of the Economic and Social History of the Orient*/*Journal de l'histoire Economique et Sociale de l'Orient* 1970; P Vernia 'The Muhtasib of Valencia and Pharmacy in Aragon' *Pharmacy in History* 30(2) 1988.

20 RP Buckley 'The Muhtasib' *Arabica* 39(1) 1992.

21 I Hazm, A Muhammad'Alli 'Jamharat ansab al-'arab' Abd Al-Salam Harun (Ed) (Cairo 1962) p. 400.

22 RP Buckley 'The Muhtasib' *Arabica* 39(1) 1992 p. 61.

The *Qur'an* strengthens the legal basis for market and business regulation through prescriptions in *Surah Mutaaffifin*, which is concerned with wrongful and fraudulent practices in the market. The term *mutaaffifin* literally means 'dealer in fraud' and it was further elucidated by *al-Tabari* to mean a person who gives deficient weight and measures or perpetrates insufficiency in calculation and quantity.²³ The first three verses of *Surah Mutaaffifin* are as follows:

Woe to those who deal in fraud. Those who, when they have to receive by measure from men, exact full measure. But, when they have to give by measure or weight to men, give less than due.

The prescription in the *Qur'an* has been of some interest to Arabs and Muslims to study physical components and substances of materials for the purposes of ascertaining the weight.²⁴ Anton Heinen opined that the study of science and arts related to weights and measures in the Muslim world, exceeds the attention given to it by the Greeks.

Muhtasib was appointed to enforce scales and measures in public and market places. The criteria for the appointment of a *muhtasib* during this period would include that such person had to be known by the community, trade or profession which he was to regulate. Classical Muslim philosophers such as Ibn Khaldun and Yahya al-Andalusi consider the qualification of a *muhtasib* as similar or the same as that of the *Qadi* due to the public judicial role they perform.²⁵ However, Al-Mawardi specifically mentions that such person should be a

²³ Al-Tabari (1999) *Tafsir al-tabari*. Dar Al-Kutub Al-'Ilmiyya.

²⁴ AM Heinen (1983) 'At the Roots of the Medieval Science of Weights: A Report on an Edition Project' *Journal of Sophia Asian Studies* 1 (1983) pp. 44-55; U Rebstock 'Weights and Measures in Islam' in H Selin (Ed.) *Encyclopaedia of the History of Science, Technology, and Medicine in Non-Western Cultures* (2008) pp. 2255-2267).

²⁵ Muhammad Al-Mawardi *Al-ahkam al-Sultaniyyah* (1960) p. 208.